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Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

SEAN MCQUIDDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Does federal law that bars appellate courts from hearing an appeal of a district court's denial of a motion made by the Government pursuant to §5K1.1 of the United States Sentencing Guidelines violate the right of a criminal defendant to due process of law as guaranteed by the United States Constitution?

2. Can a criminal defendant waive before sentencing the right to appeal a sentence imposed where the sentence later imposed was tainted by abuse of discretion?

Table of Contents

Questions Presented i

Table of Contents ii

Table of Cited Authorities iii

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions, Statutes and Rules Involved 2

Statement of the Case 4

Reasons for Granting the Writ 10

Denying a criminal defendant appellate review of a district court's denial of a motion made by the Government under United States Sentencing Guidelines §5K1.1 denies that defendant due process of law 11

A criminal defendant cannot prospectively waive the right to appeal a sentence tainted by a district judge's abuse of discretion 17

Conclusion 20

Table of Cited Authorities

Cases

Gardner v. Florida, 430 U.S. 349, 358 (1977) 10

Koon v. United States, 518 U.S. 81, 116 S.Ct. 2035, 2053, 135 L.Ed.2d 392 (1996) 12

United States v. Ashe, 47 F.3d 770 (6th Cir. 1995) 17

United States v. Beltran, 109 F.3d 365 (7th Cir. 1997) 11

United States v. Brown, 985 F.2d 478 (9th Cir. 1993) 11

United States v. Casiano, 113 F.3d 420, 429 (3rd Cir. 1997) 11

United States v. Castellanos, 904 F.2d 1490, 1497-98 (11th Cir. 1990) 11

United States v. Davis, 919 F.2d 1181, 1187 (6th Cir. 1990) 11

United States v. Dellinger, 986 F.2d 1042, 1044 (6th Cir. 1993) 11, 16

United States v. Draper, 888 F. 2d 1100, 1105 (6th Cir. 1989)..... 10, 11

United States v. Edgar, 971 F.2d 89, 92-93 (8th Cir. 1992)..... 11

United States v. Fernandez, 127 F.3d 277, 282 (2nd Cir. 1997)..... 11

United States v. Flanagan, 87 F.3d 121 (5th Cir. 1996) ... 11

United States v. Henderson, 72 F.3d 463, 465 (5th Cir. 1995)..... 17

United States v. Malvito, 946 F.2d 1066, 1068 (4th Cir. 1991)..... 11

United States v. Munoz, 946 F.2d 729, 730-31 (10th Cir. 1991)..... 11

United States v. Pighetti, 898 F.2d 3, 4 (1st Cir. 1990)..... 11

United States v. Ready, 82 F.2d 551, 556 (2nd Cir. 1996)..... 17, 19

United States v. Smith, 918 F.2d 664 (6th Cir. 1990)..... 11

Wade v. United States, 504 U.S. 181, 185 (1992) 12

Wheat v. United States, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) 18

Williams v. United States, 503 U.S. 193, 203 (1992) . 16, 17

Statutes

18 U.S.C. §1956(a)(1)(A)(i) 4

18 U.S.C. §1956(a)(1)(B)(ii) 4

18 U.S.C. §2 4

18 U.S.C. §3742 ..... 1, 2

18 U.S.C. §922(g)(1) 4

18 U.S.C. §924(a)(2) 4

21 U.S.C. §846 4

28 U.S.C. §991 ..... 3, 12

28 U.S.C. §994(d) 3, 12

28 U.S.C. 1291 1

Other Authorities

Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice, Maxfield and Kramer, January 1998 ..... 13, 14

United States Sentencing Commission Guidelines §5K1.1 ..... passim

United States Sentencing Guideline §5H1.10 12

Constitutional Provisions

Fifth Amendment 2, 12

Petitioner, Sean McQuiddy ("Mr. McQuiddy"), respectfully requests that a writ of certiorari be issued to review the decision below of the United States Court of Appeals for the Sixth Circuit.

Opinions Below

The Order of the United States Court of Appeals for the Sixth Circuit, filed 16 March 1999, in the case of *United States of America v. Sean McQuiddy*, No. 98-6136, is not published but is included within the Appendix to this Petition. Likewise, the Order of the United States Court of Appeals for the Sixth Circuit denying Mr. McQuiddy's petition for rehearing en banc is not published but is included in the Appendix to this Petition.

Statement of Jurisdiction

The Order of the United States Court of Appeals for the Sixth Circuit was filed on 16 March 1999. Mr. McQuiddy's *Petition for Rehearing En Banc* was denied by Order filed 23 April 1999. This Petition is filed on or before 14 June 1999, within ninety days after entry of the Order of 16 March 1999, and is, pursuant to Rule 29, timely. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742.

Constitutional Provisions, Statutes and Rules Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [no person] shall be deprived of life, liberty, or property, without due process of law....

The pertinent portions of 18 U.S.C. §3742 are:

> (a) Appeal by a Defendant. - A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence -
>
> (1) was imposed in violation of law;
>
> ***
>
> (e) Consideration. - Upon review of the record, the court of appeals shall determine whether the sentence-
>
> (1) was imposed in violation of law;
>
> ***
>
> (f) Decision and Disposition. - If the court of appeals determines that the sentence -
>
> (1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

The pertinent portions of 28 U.S.C. §991 are:

> **(b)** The purposes of the United States Sentencing Commission are to-
>
> **(1)** Establish sentencing policies and practices for the Federal criminal justice system that-
>
> **(A)** assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;
>
> **(B)** Provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices....

In pertinent part, 28 U.S.C. §994(d) provides:

> The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

§5K1.1 of the United States Sentencing Guidelines provides in pertinent part:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

Note 3 to §5K1.1 of the United States Sentencing Guidelines provides:

> Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Statement of the Case

Mr. McQuiddy was arrested in Nashville, Tennessee on August 15, 1997 in connection with the Government's investigation of a conspiracy to distribute cocaine. The United States District Court for the Middle District of Tennessee had jurisdiction pursuant to 21 U.S.C. §846, 18 U.S.C. §1956(a)(1)(A)(i), 18 U.S.C. §922(g)(1), 18 U.S.C. §924(a)(2), 18 U.S.C. §1956(a)(1)(B)(ii) and 18 U.S.C. §2 because the elements of the offenses to which Mr. McQuiddy pled guilty occurred within the Middle District of Tennessee.

The conspiracy began in 1995 when Linus Leppink ("Leppink") introduced Darrell McQuiddy, Sean McQuiddy's younger brother, to James Hardy ("Hardy"). In summary, Leppink introduced Darrell McQuiddy and Hardy to one another because Hardy asked Leppink if Leppink knew

anyone in the Nashville area who could distribute cocaine supplied by Hardy. Hardy would bring kilograms of cocaine from Florida to Tennessee where either he or Leppink would convey some or all of the cocaine to Darrell McQuiddy. Darrell McQuiddy would sell kilograms of cocaine to lower level dealers and convey some cocaine to Sean McQuiddy which Sean McQuiddy would then transform into crack cocaine and sell.

After an investigation, Hardy, Leppink, Darrell McQuiddy, Sean McQuiddy and others were indicted for conspiracy to distribute cocaine, money laundering and other charges. On February 17, 1998, the Government issued plea agreement letters to Leppink, Darrell McQuiddy, and Sean McQuiddy. The plea agreement tendered to Sean McQuiddy provided, *inter alia*, as follows:

> 13. Based upon the defendant's substantial assistance *as of this date*, the government *will* file a motion for downward departure pursuant to U.S.S.G. Section 5K1.1, stating the extent to which the defendant has provided substantial assistance in the investigation and/or prosecution of other person(s) who has/have committed an offense, provided he/she continues to fully and truthfully cooperate and provide substantial assistance. All information provided by the defendant in debriefings may be revealed to the court.
>
> 14. The extent of any departure recommended by the government is entirely within the government's sole discretion, without review or appeal by the defendant of any kind. If the defendant is completely truthful and cooperative, the government agrees to recommend a downward departure that puts the

> defendant, at most, in the 324-405 month imprisonment range. The government will not file a motion authorizing the court to depart below the applicable statutory minimum imprisonment for Count 4 (10 years).

(emphasis supplied)

The plea agreements received by Leppink and Darrell McQuiddy contained identical or substantially similar language. These conditional commitments to file a §5K1.1 motion recited that the Government was extending this conditional commitment "based upon the defendant's substantial assistance *as of this date*..." The emphasized text demonstrates that as of February 17, 1998, the Government considered the assistance rendered by Mr. McQuiddy, Darrell McQuiddy and Leppink to be substantial enough to justify a §5K1.1 motion on behalf of each of them.

The Government also made specific conditional commitments in the plea agreements regarding the downward departure recommendation the Government would make for each defendant. In Darrell McQuiddy's case, the Government conditionally agreed to recommend a downward departure in the range of a one level departure to as much as 50% downward departure.[1] In Leppink's case, the Government conditionally agreed to recommend a sentence range between 11 and 15 years; the Government reserved the right to later recommend a specific sentence within this range. As noted, the Government committed conditionally to

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1. Darrell McQuiddy was sentenced on November 24, 1998 to a term of 235 to 293 months, including the benefit of a 3-level downward departure after the court granted the Government's §5K1.1 motion.

recommend a sentence in the 324-405 month imprisonment range for Mr. McQuiddy.

Leppink came before the Honorable Thomas A. Higgins, Judge of the United States District Court for the Middle District of Tennessee, to be sentenced on June 22, 1998. Before this sentencing hearing, the Government filed on May 14, 1998 its Position with Respect to Sentencing Factors in Leppink's case. In its position paper, the Government urged the district court to impose upon Leppink's sentence a

> two level enhancement for obstruction of justice for making false statements at his plea hearing about the Mercedes Benz and the amount of money received from Darrell McQuiddy on March 5, 1997...[s]ince these statements were material to the money laundering and drug conspiracy charges, the United States believes the defendant should receive a two level increase for his perjurious statements to the court.

Leppink at some point in the investigation and/or prosecution made at least two additional false statements, one of which implicated police officers in theft of seized cash. FBI Special Agent Thomason testified at Leppink's plea hearing that Leppink had testified earlier that day contrary to Leppink's proffer statement regarding the number of times and amount of cocaine he had delivered to Darrell McQuiddy. More significantly, a month later at Mr. McQuiddy's sentencing hearing, the same Special Agent testified, in part, as follows:

> Q. Did the investigation show that Mr. Leppink had *purposely* overstated the amount of money seized

> from him to raise the allegation that *officers had stolen the money*?
>
> A. Yes, he did.

(emphasis supplied).

Notwithstanding the Government's position that Leppink should receive a sentence *enhancement* for obstructing justice and despite the two additional times Leppink offered false testimony, the Government filed a §5K1.1 motion on his behalf. The district court granted the §5K1.1 motion without any discussion whatsoever notwithstanding all that Leppink had done in breach of his plea agreement.

The district court sentenced Leppink to 180 months in prison, a sentence that had been adjusted by a 55-month downward departure from the bottom of the sentence range because of the §5K1.1 motion. Leppink escaped any liability for the alleged obstruction of justice and got a 4½ year reduction of his sentence for his purported "substantial assistance." In the end, despite allegedly obstructing justice and at least twice offering false testimony, Leppink got the full benefit of his plea agreement.

On July 23, 1998, the Government filed on behalf of Mr. McQuiddy a motion pursuant to §5K1.1 of the Sentencing Guidelines for a downward departure from the mandatory life sentence Mr. McQuiddy was otherwise facing. The Government's §5K1.1 motion on Mr. McQuiddy's behalf acknowledged that Mr. McQuiddy's proffer statements "have been of some limited substantial assistance in this or other investigations..." The Government also noted that Mr. McQuiddy had corroborated information that implicated his own brother in a drive-by murder. Darrell McQuiddy had

steadfastly denied any involvement in that murder until confronted with Sean McQuiddy's proffered information.

The Government's §5K1.1 motion included statements that the portions of Mr. McQuiddy's proffers that had been untruthful had undermined the value of his truthful statements to authorities. Nonetheless, after weighing Mr. McQuiddy's assistance and "considering the pertinent factors under [§5K1.1] and the defendant's acknowledgement of his obligation to testify truthfully [in the future]", the Government ultimately decided to make a "less favorable recommendation" than was contemplated in the plea agreement. The Government specifically recommended a downward departure of one level to "spare the defendant from the mandatory life sentence" otherwise applicable.

While speaking to counsel for Mr. McQuiddy during the sentencing hearing, the district court remarked that Mr. McQuiddy's uncorroborated claims regarding bribing police officers "leaves the court with a sense of the need to take a good shower." The district court expressed substantial outrage at Mr. McQuiddy for "scarr[ing] two innocent [police officers]." That comment marked one of at least five times the district court interjected to use the term "scarred" during Mr. McQuiddy's counsel's argument to express the district court's perception of the effect on the officers of McQuiddy's uncorroborated claims.

At the conclusion of the sentencing hearing on July 24, 1998, District Judge Thomas A. Higgins denied the Government's §5K1.1 motion and sentenced Mr. McQuiddy to life in prison without the possibility of parole. Mr. McQuiddy was then 31 years old.

Mr. McQuiddy maintains that it was an abuse of discretion for the district court to grant the Government's §5K1.1 motion benefiting Leppink and then deny Mr. McQuiddy the benefit of a §5K1.1 motion given the substantially similar circumstances surrounding Leppink and Mr. McQuiddy insofar as the §5K1.1 motions are concerned. Due process is as integral to the sentencing process as it is to the adjudication of guilt or innocence. *See Gardner v. Florida*, 430 U.S. 349, 358 (1977). Mr. McQuiddy maintains that the abuse of discretion that he claims permeated his sentence constitutes a violation of his constitutional right to due process.

Reasons For Granting The Writ

The Government argued in the appellate court below that Mr. McQuiddy has no right to appeal the district court's denial of the Government's §5K1.1 motion for at least two reasons. First, the Government argued that as a matter of law, no appeal lies from a district court's refusal to depart from the Sentencing Guidelines. *See United States v. Draper*, 888 F.2d 1100, 1105 (6th Cir. 1989). Second, the Government argued that Mr. McQuiddy waived his right to appeal for any reason other than ineffective assistance of counsel, prosecutorial misconduct, or an upward departure. Mr. McQuiddy respectfully submits that (1) the rights guaranteed to him by the United States Constitution are violated by the application of statutes and/or case law that bars an appeal of his sentence where the appeal contends his sentence was tainted by abuse of discretion and (2) he did not intend to and could not as a matter of law prospectively forfeit his right to appeal a sentence tainted by the district court's abuse of discretion.

1. ***Denying a criminal defendant appellate review of a district court's denial of a motion made by the Government under United States Sentencing Guidelines §5K1.1 denies that defendant due process of law.***

Mr. McQuiddy acknowledges that the courts of appeal are uniform in holding that no appeal lies from a district court's denial of a §5K1.1 motion or failure or refusal to depart downward so far as the Government recommended or defendant hoped. *United States v. Fernandez*, 127 F.3d 277, 282 (2nd Cir. 1997); *United States v. Casiano*, 113 F.3d 420, 429 (3rd Cir. 1997); *United States v. Beltran*, 109 F.3d 365 (7th Cir. 1997); *United States v. Flanagan*, 87 F.3d 121 (5th Cir. 1996); *United States v. Brown*, 985 F.2d 478 (9th Cir. 1993); *United States v. Edgar*, 971 F.2d 89, 92-93 (8th Cir. 1992); *United States v. Malvito*, 946 F.2d 1066, 1068 (4th Cir. 1991); *United States v. Munoz*, 946 F.2d 729, 730-31 (10th Cir. 1991); *See United States v. Smith*, 918 F.2d 664 (6th Cir. 1990)(J. Nelson, concurring)(citations omitted); *United States v. Castellanos*, 904 F.2d 1490, 1497-98 (11th Cir. 1990); *United States v. Pighetti*, 898 F.2d 3, 4 (1st Cir. 1990). The Sixth Circuit has held that an informed denial of a departure is not subject to appellate review. *See United States v. Dellinger*, 986 F.2d 1042, 1044 (6th Cir. 1993) (denial of §5K1.1 motion); *United States v. Davis*, 919 F.2d 1181, 1187 (6th Cir. 1990) (refusal to depart under §5K2.13); *United States v. Draper*, 888 F. 2d 1100, 1105 (6th Cir. 1989).

Mr. McQuiddy respectfully submits that such a rule of law is flawed. Mr. McQuiddy respectfully submits that this Court should overrule the line of cases holding that a district

court's denial of a motion for downward departure is not subject to appellate review.

The Fifth Amendment to the United States Constitution is the foundation for the compelling rationale that this Court should at least permit appellate review of the denial of a §5K1.1 motion. The Fifth Amendment guarantees Mr. McQuiddy that he shall not be deprived of liberty without due process of law. Mr. McQuiddy contends that due process of law, in this instance, must permit at least the opportunity to present his appeal on its merits. Due process of law precludes disparate treatment in sentencing on account of a defendant's race, religion, creed, national origin, or sex. *See Wade v. United States*, 504 U.S. 181, 185 (1992)(district court can review prosecution's refusal to make a §5K1.1 motion where refusal is based upon unconstitutional motive, such as race); *see also* U.S.S.G. §5H1.10.

Similarly, and in furtherance of the guarantee of due process of law, the legislation that precipitated the sentencing guidelines requires that the sentencing guidelines produce certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. 28 U.S.C. §991(b), 28 U.S.C. §994(d). Indeed, this Court noted in *Koon v. United States* that:

> [t]he goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide

> uniformity, predictability, and a degree of detachment lacking in our earlier system.

Koon v. United States, 518 U.S. 81, 116 S.Ct. 2035, 2053, 135 L.Ed.2d 392 (1996).

However, at least one recent empirical study suggests that sentencing disparities not only persist under the sentencing guidelines as applied, but that the sentencing guidelines as applied might actually cause or allow constitutionally infirm sentencing disparities, particularly those sentences in which §5K1.1 is at issue. *See Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, Maxfield and Kramer, January 1998.[2] This study provides empirical data that was unavailable when the various courts of appeal held that discretionary denials of a §5K1.1 motion were beyond review on appeal. The data in this study present compelling reasons to revisit the precedent that has barred appellate review of district court's denials of §5K1.1 motions.

In fiscal years 1994, 1995 and 1996, nineteen percent of all federal criminal convictions involved §5K1.1 motions that were granted; approximately 7,500 cases annually implicated §5K1.1. Maxfield and Kramer, pg. 4. Maxfield and Kramer observe that while district courts are not obliged to grant a §5K1.1 motion, "information obtained by the Commission indicates that ***the vast majority of [downward departure]***

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2. Maxfield and Kramer were, as of the publication of this study, respectively the Acting Director of the Office of Policy Analysis and Staff Director of the United States Sentencing Commission.

motions are granted as a matter of course." Maxfield and Kramer, p. 5, n.11 (emphasis supplied).

The empirical data in the study show that as the number of §5K1.1 motions has risen, so has the variation of use of §5K1.1 among the judicial circuits and districts. Even worse, so, too, rose the disparate use of §5K1.1 across demographic characteristics, "most notably race and citizenship status." Maxfield and Kramer, pg. 5. The study concluded that even after

> [h]olding constant important variables such as offense type, guideline range, mitigating and/or aggravating factors, weapon involvement, and a host of other possible explanatory concepts, the study found that personal characteristics remained significant predictors of who received [motions for] substantial assistance departures...."[3]
>
> ***
>
> ...the evidence consistently indicated that factors that were associated with either the making of a §5K1.1 motion and/or the magnitude of the departure were not consistent with principles of equity [e]ven more worrisome, legally irrelevant factors (*e.g.* gender, race, ethnicity, citizenship) were found to be statistically significant in explaining §5K1.1 departures.

Maxfield and Kramer, pp. 13-14, 21.

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3. Specifically, according to the study, a Hispanic defendant was seven percent less likely to have the benefit of a §5K1.1 motion than a non-Hispanic. Maxfield and Kramer, p. 14.

Thus, application of §5K1.1 of the Sentencing Guidelines is resulting in disparity in sentences.[4] Clearly, to hold as a matter of law that a district court's decision to deny a §5K1.1 motion is beyond appellate review exacerbates this disturbing trend identified by Maxfield and Kramer.

This observed inconsistency almost compels the acknowledgement that if the Government is inconsistently exercising or withholding its discretion in the making of §5K1.1 motions, the district courts are likewise inconsistent in applying their discretion as to the §5K1.1 motions that are made. Indeed, to the extent the district courts routinely grant such motions as a matter of course, as found by Maxfield and Kramer, and some portion of those motions are based on an inconsistent interpretation and application of §5K1.1, the district courts are usurping, albeit perhaps inadvertently, the goals of the sentencing statutes and guidelines.

The empirical data collected by Maxfield and Kramer demonstrates that the uniformity and consistency in and elimination of impermissible factors from sentencing that had been central goals of the Sentencing Guidelines have not been achieved. Assuming, *arguendo*, that the Sentencing Guidelines have enhanced uniformity and consistency in and reduced the impact of impermissible factors on sentencing, the enhancements nonetheless do not relieve the federal judiciary of the obligation to ensure due process. To the extent the hoped-for uniformity and consistency has not been

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4. The fact that the sentencing guidelines might not facially violate a defendant's right to a sentence free from impermissible factors does not cure the fact that the guidelines, as applied, result in disparate impact upon minorities.

fully secured in the district courts, relief in the appellate courts is necessary to protect criminal defendants' constitutional rights.

In addition to the empirical evidence that §5K1.1 as applied is causing and/or allowing sentencing disparities, simple reasoning counsels this Court to permit appellate review of cases where a district judge has denied a §5K1.1 motion. The line of cases completely barring appellate review of a district court's denial of a §5K1.1 motion permits of patently unconscionable results. For example, assume a district judge denied a §5K1.1 motion solely because of the judge's prejudice against the defendant because of the defendant's national origin. Under *United States v. Dellinger* and similar holdings, that defendant could not obtain relief even were that defendant to have available proof positive that the district judge denied the §5K1.1 motion solely because of the constitutionally impermissible basis of the defendant's national origin. This result, no matter how unlikely the predicate facts may seem, is the only permissible result under the present law of every circuit. This result, in addition to being intellectually and morally indefensible, is unconstitutional. Logic suggests that appellate review must be afforded to a defendant who claims that a district court abused its discretion by denying a §5K1.1 motion.

Precedent of this Court also should permit the opportunity for appellate review sought by Petitioner. This Court has previously held that:

> [w]hen a reviewing court concludes that a district court based a departure on both valid and invalid factors, a remand is required unless it determines the

district court would have imposed the same sentence absent reliance on the invalid factors.

Williams v. United States, 503 U.S. 193, 203 (1992).

Petitioner submits that it is a fair, logical and appropriate extension of the foregoing language for this Court to now hold that "[w]hen a reviewing court concludes that a district court based its decision *not to depart* on both valid and invalid factors, a remand is required unless it determines the district court would have imposed the same sentence absent reliance on the invalid factors."

2. ***A criminal defendant cannot prospectively waive the right to appeal a sentence tainted by a district judge's abuse of discretion.***

Mr. McQuiddy contends that he did not intend to and, indeed could not as a matter of law, prospectively waive his right to appeal an abuse of discretion by the district court. The United States Court of Appeals for the Sixth Circuit has held that defendants can validly waive their right to appeal their sentence provided the waiver was made voluntarily and knowingly. *See United States v. Ashe*, 47 F.3d 770 (6th Cir. 1995).

However, courts narrowly construe waivers. *See United States v. Ready*, 82 F.2d 551, 556 (2nd Cir. 1996). Courts have, moreover, found certain waivers to be invalid *per se*. For example, it has been held that a criminal defendant cannot, as a matter of law, waive his right to appeal based on ineffective assistance of counsel. *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995). Likewise, a criminal

defendant's right to have a lawyer free from conflicts of interest cannot be waived because, in part, such a conflict undermines the integrity of the court. *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

Mr. McQuiddy entered a plea arrangement that waived his right to appeal the sentence imposed except in the case of ineffective assistance of counsel, prosecutorial misconduct, or an upward departure. Leaving aside the upward departure basis for an appeal because there could not have been an upward departure, Mr. McQuiddy's two remaining avenues of appeal guarantee that whatever else happens, Mr. McQuiddy would not receive a sentence tainted by his lawyer's ineffective assistance or the misconduct of the prosecution.

Obviously, the presence of either ineffective assistance of counsel or prosecutorial misconduct vitiates the integrity of the sentence. The right to appeal such a failure of the system is at the very core of our system of jurisprudence. It strains logic and law to admit that the acts or omissions of officers of the court can so thoroughly taint the plea bargain and sentencing process that an appeal should be allowed but to then deny that same defendant even an opportunity to appeal if a third officer of the court - the judge - fails or refuses to honor the obligations he or she has undertaken. In the sentencing phase, it is the judge, not the prosecuting or defending lawyers, whose misconduct can most thoroughly defeat the defendant's right to due process of law. Query, then, whether it can be credibly contended that the defendant should not be afforded an opportunity for relief from the misdeeds or mistakes of a judge if similar conduct by the

defendant's lawyer or the prosecuting attorney are specifically reserved bases for appeal of the sentence?

In short, judicial abuse of discretion thoroughly vitiates the fundamental rights of a criminal defendant.[5] Indeed, it can reasonably be argued that judicial abuse of discretion more completely contaminates the proceedings and violates the defendant's constitutional rights because the judge can, if aware of ineffective assistance of counsel or prosecutorial misconduct, fashion a remedy to the problem. Judicial abuse of discretion, however, can probably be remedied *only* on appeal. Surely, the same considerations that preclude waiver of ineffective assistance of counsel and prosecutorial misconduct claims demands the opportunity to appeal a judicial abuse of discretion.

That being the case, Mr. McQuiddy maintains that he could not, as a matter of law, knowingly and voluntarily waive prospectively his right to appeal a sentence tainted by judicial abuse of discretion. This Court should hold that Mr. McQuiddy is not barred from appealing his sentence and remand to the lower court with appropriate instructions. Alternatively, this Court should permit Mr. McQuiddy to pursue adjudication on the merits of his appeal based on the abuse of discretion that Mr. McQuiddy maintains occurred.

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5. At least one court has noted that an implicit assumption in waivers of a defendant's rights is that the court will act legally and properly in executing the waiver. *U.S. v. Ready,* 82 F.3d 551, 559 (2nd Cir. 1996).

Conclusion

Mr. McQuiddy therefore respectfully requests that this Court grant this Petition, hold that an appeal lies on his claim that the district court abused its discretion by denying the §5K1.1 motion and remand the case to the lower court for appropriate proceedings.

Respectfully submitted,

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NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 98-6136

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	FILED
	)	MAR 16 1999
	)	
v.	)	ORDER
	)	
SEAN MCQUIDDY,	)	
	)	
Defendant-Appellant.	)	

Before: WELLFORD, SUHRHEINRICH, and MOORE, Circuit Judges.

The defendant appeals the life sentence imposed pursuant to his plea of guilty to charges of conspiracy to distribute cocaine and crack cocaine, money laundering, and possession of handguns by a convicted felon. the government now moves to dismiss the appeal. The defendant has filed a response in opposition.

In his proof brief, the defendant presents a single issue for review: "[w]hether the district court abused its discretion when it denied the Government's motion for downward departure pursuant to §5K1.1 of the Federal Sentencing Guidelines." This court has held that it " has no jurisdiction to hear an appeal of a district court's discretionary refusal to depart downward pursuant to U.S.S.G. §5K1.1." *United States. v. Dellinger*, 986 F. 2d 1042, 1044 (6th Cir. 1993). "A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *Salmi v. Secretary of Health and Human Services*, 774 F.2d 685,689 (6th Cir. 1985). *See United States v. Washington*, 127 F.3d 510, 517 (6th Cir. 1997), *cert. Denied*, 118 S.Ct. 2348 (1998); *United States v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996). We have

reviewed the defendant's proof brief, and we are not persuaded that the Supreme Court's decision in *Koon v. United States*, 518 U.S. 81 (1996), is inconsistent with this court's decision in *Dellinger*. *See United States v. Brown*, 98 F.3d 690, 692 (2nd Cir. 1996)("Because *Koon* did not involve a judge's decision not to depart, it does not affect the law of this Circuit barring appeal when a district court decides not to depart.").

The government's motion to dismiss is GRANTED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

No. 98-6136

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	FILED
	)	APR 23 1999
	)	
v.	)	ORDER
	)	
SEAN MCQUIDDY,	)	
	)	
Defendant-Appellant.	)	

Before: WELLFORD, SUHRHEINRICH, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk